Supreme Court, U.S.
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No. 041450

In the Supreme Court of the United States

TERENCE ANDERSON

Petitioner

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1) Was Petitioner's Fourth Amendment right to be free of unreasonable searches and seizures violated by:

   A) The search of his secret and private compartment located within his home by government agents?

   B) The seizure by government agents of his personal property (gun collection) that was secured within his secret and private compartment located within his home?

2) Should this Court grant Certiorari to resolve conflict among federal and state courts on whether a spouse and joint occupant may give law enforcement valid consent to search, which would compromise the other spouse's expectation of privacy?[1]

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[1] This Court has recently granted certiorari in a similar case, see *Georgia v. Randolf*, No. 04-1067, Petition for Certiorari filed 2-4-05, Cert. granted.

LIST OF PARTIES TO THE PROCEEDING

The caption of the case accurately reflects all parties to the proceeding before this Court.

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CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED

(I) Date of judgment sought to be reviewed:

The Order and Judgment of which review is sought was filed December 15, 2004

(ii) Date of any order respecting rehearing:

February 9, 2005

(iii) Cross Petition:

None

(iv) Statutory Provision Believed to Confer Jurisdiction:

Pursuant to Title 28, United States Code § 1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

(v) The provisions of Supreme Court Rule 29.4(b) and c are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

THE CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES WHICH THE CASE INVOLVES

(1) Constitutional Provisions:

Fourth Amendment, U.S. Constitution
Fifth Amendment, U.S. Constitution

(2) Statutes Involved: As follows

18 U.S.C. § 922(o) Unlawful Acts

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine gun.

(2) This subsection does not apply with respect to...

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

18 U.S.C. § 924(a)(2) Penalties

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

26 U.S.C. § 5845 Definitions:

For the purpose of this chapter...

(a) **Firearm.** The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as

modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in Section 921 of title 18, United States Code); and (8) a destructive device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the, date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

26 U.S.C. § 5861(d) Prohibited Acts:

It shall be unlawful for any person....

> (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; ...

26 U.S.C. § 5871. Penalties

Any person who violates or fails to comply with any provisions of this chapter shall, upon conviction, be fined not more than $10,000, or imprisoned not more than ten years, or both.

28 U.S.C. § 1254 (1). Courts of appeals; certiorari;

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case,

before or after rendition of judgment or decree...

CONCISE STATEMENT OF THE CASE

Basis of Jurisdiction in Court of First Instance

The Petitioner seeks review of a judgment entered by a United States Court of Appeals (Fifth Circuit). The jurisdiction of the district court below was based originally upon alleged violations of the laws of the United States. The United States District Court for the Northern District of Texas has original jurisdiction over offenses against the laws of the United States which occur in that District. Title 18, United States Code, Section 3231.

Facts Material to Consideration of Question Presented

Nature of the case:

Petitioner, Terence Anderson, was charged by indictment with one count of possession of unregistered firearms and one count of possession of firearms bearing no serial number in violation of 26 U.S.C. §§5845(a), 5861(d) and 5871. He was further charged with the unlawful possession of machine guns in violation of 18 U.S.C. §§922(o) and 924(a)(2). (Vol. 1, pp. 10-15). Petitioner filed a motion to suppress the evidence obtained as a result of the illegal search and seizure of a private compartment in the Petitioner's marital home residence. (Vol. 1, p. 66-70). The district court granted a hearing on the motion and then subsequently denied the motion to suppress by written order. (Vol. 2, pp. 2-86; Vol. 1, pp. 151-57). Petitioner filed a motion to reconsider this ruling which was denied by the district court. (Vol. 1, pp. 158-64).

Thereafter, Petitioner pled guilty to count one of the indictment, reserving the right pursuant to Fed. R. Crim. P 11(a)(2) to appeal the district court's denial of Petitioner's motion to suppress. (Vol. 1, p 178). On February 12, 2004, Petitioner was sentenced to thirty-six (36) months imprisonment followed by a three (3) year term of supervised release. (Vol. 1, pp 205-06). In addition Petitioner was ordered to pay a fine of $20,000. (Vol. 1, p. 208). Petitioner timely filed a notice of appeal on February 23, 2003. Following full briefing, but without benefit of oral argument, a panel of the U.S. Court of Appeals for the Fifth Circuit affirmed the district court's denial of Petitioner's motion to suppress (No. 04-10232, December 15, 2004) in a per curiam opinion. Petitioner timely filed a request for Rehearing En Banc. The Petitioner pointed that the court's reliance on *U.S. v. Shelton*, 337 F3d 529 (5th Cir 2003) on the issue of foreseeability of the private party search contravenes the rule set forth in *U.S. v. Paige*, 136 F3d 1012 (5th Cir 1998). The court's per curiam Opinion thus contravenes another Fifth Circuit Panel's Opinion in such reasoning. Further, the court's holding conflicts with a decision, of the Seventh Circuit in which that court held that a presumption of authority of a spouse to consent to a search of all areas of a home may be rebutted by showing the consenting spouse was denied access. See *U.S. v. Duran*, 957 F2d 499 (7th Cir. 1992). The court's per curiam opinion in which it holds that an intrusion by a co-owner or spouse of a homeowner is always foreseeable, irrespective of the activities of the defendant or the circumstances in the home, creates a circuit conflict and an inner circuit conflict.

Rehearing En Banc was denied on February 9, 2005.

Facts of the Case:

Petitioner, on the date of the offense, was Lieutenant Colonel in the United States Army Reserves assigned to the U.S. Army General Staff, OCAR Congressional Liaison, as OCAR's "Homeland Security Specialist", with a Top Secret/Sensitivity Security Clearance, one of the highest clearances in the U.S. Army. Petitioner served in the U.S. Army Reserves for over thirty (30) years.

Additionally, Petitioner represented the United States in international and Olympic competition in pistol shooting for 27 years and was the former U.S. National Pistol Olympic Team Coach. Petitioner won numerous medals for the U.S. over the years and received 17 national titles.

Petitioner was on the Board of Directors of Interrand Corp.(1981-86), where he was given five "prototype" silencers to demonstrate to the Department of Defense. After demonstrating the silencers, Petitioner stored them in a secret compartment in his home.

Petitioner was later elected President of Combat Core Certification Professionals, Inc., which administered four classified contracts to the United States Government and the Department of Defense supplying various weapons systems. During this period, Petitioner was given "collector grade" automatic weapons, which were also stored in the same compartment in his home.

In 1982, after moving into his home, Petitioner, with his wife's full knowledge, built the security closet which was hidden behind a thirty pound bookcase and caulked shut. The purpose of the closet was to store the collection, which was worth over $75,000. Petitioner instructed Mrs.

Anderson to never enter the concealed gun storage compartment to which she agreed.

Petitioner, although a dual citizen of the U.S. and Australia, held dual passports; however, his permanent home was in the United States.

On February 12, 2003, Petitioner departed on a scheduled business trip out of the Country. On February 14, 2003, unknown to Petitioner, Petitioner's wife Marylynn Anderson filed a petition for divorce and employed Ms. Reedy as her attorney and representative. On February 16, 2003, Mrs. Anderson and her attorney Ms. Reedy, met in the Anderson home for the sole purpose of Mrs. Anderson showing Ms. Reedy the Petitioner's guns. On the morning of February 18, 2003, Ms. Reedy, acting on Mrs. Anderson's behalf, called the ATF to "report some firearms violations" (see Suppression Transcript, hereinafter "S.T", A-17), and the government agents scheduled a visit to the Anderson home for 3:00 p.m. that afternoon. (See S.T., A-17).

On February 18, 2003, at 3:00 p.m. four government agents arrived at the Anderson home with intentions of searching and seizing the Petitioner's gun collection. They met with Mrs. Anderson and her attorney Ms. Reedy. Before coming to Petitioner's home, the government agents had not checked the National Firearms Registry ("NFR") to see if Petitioner had any guns registered. All of the guns Petitioner had would have easily been legal to possess had Petitioner registered them with the NFR and paid the appropriate tax to the IRS along with such registration. The government agents did not check the easily assessable NFR prior to coming to Petitioner's home with the intent to search in order to have legitimate probable cause that the gun collection was not registered in order that a reasonable search and seizure may be authorized.

Before the agents began to search for the guns, they negotiated a consent agreement with Mrs. Anderson, giving her, **in consideration for her assistance,** essential immunity by allowing a clause on the consent form to be stricken which waives the right to self-incrimination on anything discovered. This was done after the agents called their home office and received permission from the chief of the criminal division.

The government agents then removed the 30 pound bookcase, which had been nailed shut and made an integral part of the wall. They removed the nails and pegs securing it and opened it up exposing the secret and private compartment of Petitioner containing shelves and cases. At that point the agents then "seized" the guns which were hanging on hooks, handled them, pulled out and "seized" the enclosed containers containing the bulk of the other guns and parts. They then searched these containers and seized their contents as well. These guns were then taken by the government agents. Mrs. Anderson had informed the agents prior to any search, that all of the guns were not her property but were the property of the Petitioner. She further informed them prior to any search that she **was not authorized** to access the private compartment because she had made **an understanding and agreement** with Petitioner that this was his separate and private area. She had honored this agreement and understanding with her husband, Petitioner, for over fifteen (15) years.

The government agents initiated and conducted a search of Petitioner's home without any warrant whatsoever. Further, as it was early afternoon on a Monday, they knew and admitted that they could have easily obtained a warrant to search and to seize his gun collection and no exigent circumstances existed. The government agents **seized** Petitioner's private and separate property and took it back to

their headquarters that afternoon with no warrant to seize Petitioner's property, knowing full well at the time that it could be legally possible for the Petitioner to possess such guns had they had simply checked the NFR to see if Petitioner had any guns registered prior to their illegal search and illegal seizure.

On the very next day, February 19, 2003, Ms. Reedy, acting on behalf of Mrs. Anderson, filed in court an amended divorce petition now seeking a disproportionate share of the marital assets, and full ownership of the family-held corporation "due to her husband's violations of federal and state law" arising from his possession of the guns. Yet, at this point, the government had not even determined whether Petitioner's possession of the gun collection (by having had paid a tax and registered them with the NFR) was illegal or legal. In addition, Petitioner was far from actually being charged with the offenses alleged in the amended divorce petition.

The government seized, without a warrant, Petitioner's gun collection and, in the process, also violated Petitioner's Fourth Amendment rights and his Fifth Amendment rights to due process. It was, in fact, later determined that one "machine gun" without serial numbers was actually a "demil" gun which had been purchased legally at a gun show. Demil guns are guns which have been cut in two, which obliterated the serial numbers, and then welded back together, thereby rendering them inoperable and legal to sell or to own by anyone without any registration required as they would essentially be collector's items.

Direct and Concise Arguments for the Reasons for allowance of the Writ:

The Fourth Amendment of the Constitution of the United States proscribes:

> [T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Court has held that "[T]he Fourth Amendment protects **people not places."** *Katz v. U.S.*, 389 U.S. 347, 351, 19 L Ed. 2d 576 (1967); *Minnesota v. Carter*, 142 L Ed 2d 373, 379 (1988). The Court has noted previously that the sanctity of the home and application of the Fourth Amendment protections to it, is one of the primary original reasons for the Fourth Amendment. "[T]he 'physical entry of a home is the chief evil against which the wording of the Fourth Amendment is directed'." *Payton v. New, York*, 63 L Ed 2d 639, 650 (1980) quoting *U.S. v. U.S. District Court*, 407 U.S. 297, 313; 32 L Ed 2d 752.

Petitioner's case presents an inquiry before this Court on which a **bright line has not yet been firmly established** on multiple areas and levels. The government agents set out at 3:00 p.m., Monday February 18, 2003, to Petitioner's home with the **sole intent** to search and seize the Petitioner's guns without any probable cause that the guns were not registered with the National Fire-Arms Registry ("NFR"), without any exigent circumstances being present, and all without a search or seizure warrant. The agents, prior to

such search, were fully aware that the Petitioner was a Lt. Colonel in the U.S. Army Reserve assigned to the U.S. Army General Staff as Congressional Liaison, as OCAR's "Homeland Security Specialist", that the Petitioner was a national and international firearms competitor in that he had represented the United States in international and Olympic Competition as a multiple medal winner for over 27 years, that he was the National Olympic Team Coach (see Suppression Transcript S.T. A-25): and that the guns could have easily have been legally possessed.

The government agents were fully aware that Petitioner was out of the Country on business and would not return for three days (see S.T. A-31). Clearly, no exigent circumstances existed at the time of the search and seizure.

It was clear to the agents that an animus relationship existed between the Petitioner and his wife and that such actions by Mrs. Anderson would be antagonistic to the interests of her husband and would directly cause criminal charges to be instigated against Petitioner (see S.T. A-27). In fact, Mrs. Anderson had, through her agent (divorce attorney Ms. Reedy), contacted the government agents around 12:00 p.m. on February 18, 2003, with the mindset to violate her husband's right to privacy and to cause him harm by having him arrested. Her actions were clearly known by her to be **contrary to Petitioner's interests** because, prior to allowing the agents to search the home, she negotiated with them the right not to be incriminated by any items, information, or evidence they uncovered. This was done by written agreement via the "consent form" with government agents after they received permission from their headquarters to give Mrs. Anderson such **consideration** (marking out paragraph of the consent form covering waiving party's right against self-incrimination). Thus, for such **"consideration" given by the government to Mrs. Anderson,** she then, in

return, allowed the government agents to **search without a warrant,** without probable cause, and without any exigent circumstances (see S.T. A-22)

The Court, in *Coolidge v. New Hampshire*, 29 L Ed 2d 564 (1971), addressed a somewhat similar situation stating, "[H]ad Mrs. Coolidge, wholly on her own initiative, sought out her husband's guns and clothing and **taken them to the police station** to be used as evidence against him... the articles would later have been admissible in evidence." Id. at 595. However, the Court also explained that "[T]he **test,** as petitioner's argument suggests, **is whether Mrs. Coolidge, in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state** when she produced her husband's belongings." Id. at 595. **The Court stopped short of considering whether Mrs. Coolidge could waive her husband's constitutional protection against unreasonable searches and seizures.** This is so because the Court concluded that Mrs. Coolidge's "mindset" or "motive" was a "good faith effort" to clear her husband from suspicion. In the case at hand however, Petitioner's wife, Mrs. Anderson, had the sole requisite mental state to act **as an agent of the government** to put her husband in prison. This gave her a superior bargaining position in the divorce action she had just filed four days earlier on February 14, 2003. As for Mrs. Anderson's mindset, she had her husband all but convicted; for on the very next day, February 19, 2003, immediately after the search, she amended her divorce petition seeking a disproportionate share of the marital assets, including full ownership of the family corporation, due to her husband's "violations of federal and state law" arising from his possession of the guns (see Petitioner's Appeal Brief P 4; see also Vol. 1, p. 99 and exhibits). Yet the government had yet to determine whether the guns were properly registered and

legal or whether they were illegal. Petitioner also was far from being charged.

The Court has not addressed a situation like Petitioner's situation, which involves a mix of issues and Constitutional abridgments such as whether a spouse, acting in the manner Mrs. Anderson acted, with her requisite mindset, can waive her husband's Fourth Amendment rights against unreasonable searches (and seizures) in the sanctity of the home. **"The Fourth Amendment protects people not places".** *Katz v. U.S.*, 389 U.S. 347, 351, 19 L Ed 2d 576 (1967); *Minnesota v. Carter*, 142 L Ed 2d 373, 379 (1998). " Before agents of the government may invade the sanctity of the home, **the burden is on the government** to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to **all** warrantless home entries." *Welsh v. Wisconsin*, 466 U.S. 740, 749-750 (1984).

In this Petitioner's case, Mrs. Anderson arguably meets all criteria to be termed "an agent" of the government. It is immaterial as to the fact that Mrs. Anderson's attorney, Ms. Reedy, was the one who contacted the agents and asked them to come to the Anderson home, because Ms. Reedy was herself an agent of Mrs. Anderson acting on her behalf as attorney as opposed to a truly legitimate private party who had been given permission to have access to the Petitioner's private home as this Court describes in *U.S. v. Jacobsen*, 80 L Ed 2d 85 (1984). Consequently, applying the private search doctrine to the spouse as the "third party" would be without precedent of this Court's decisions as well against this Court's treatment of the sanctity of the marriage between a man and woman. This would, in essence, be a mockery of the purpose of the Fourth Amendment guarantee, and this Court's repeated admonishments and treatment of the sanctity of the home, the home being composed not just of

mortar and bricks, but inclusive of one's spouse as well. "In our view, the reason why an officer might enter a house or effectuate a seizure is wholly irrelevant to the threshold question whether the Amendment applies. What matters is the intrusion on the peoples' security from governmental interference." *Soldal v. Cook County*, 121 L Ed 2d 450, 463 (1992).

It was error for the district court to put the burden on Petitioner to show that, in light of the circumstances surrounding the search and seizure, that the search and seizure was not justified. "Once the defendant produces evidence that the search and seizure were warrantless, the **burden shifts** to the government to justify the warrantless search and seizure." *U.S. v. Wilson*, 36 F3d 1298, 1302 (5th Cir 1994); *Stewart v. U.S.*, 431 U.S. 932, 53 L Ed 2d 249 (1977). Consequently, if the government can not prevail on an argument that the search and seizure was justified, then it **is presumptively unreasonable** and unconstitutional. "[A] search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show the presence of exigent circumstances." *Welsh v. Wisconsin*, 466 U.S. 740, 749-750 (1984). "[S]earches and seizures [in the home] without a warrant are presumptively unreasonable". *Arizona v. Hicks*, 94 L Ed 2d 347, 355 (1987).

The government sought to put forth an argument that the search was the product of a "private party" search and additionally was justified by Mrs. Anderson's consent to search, thereby putting the burden upon the Petitioner to show such search was unreasonable. Certainly it cannot be held, as discussed ante, that Ms. Reedy was a "private party" who inadvertently conducted a search as this Court has described "private parties" surrounding such issue. Ms. Reedy, acting in the capacity of Mrs. Anderson's attorney,

was acting "on behalf of Mrs. Anderson". Thus, such construction, by the government, would be the same as if Mrs. Anderson's "search" of the couple's home would be construed as a "private party" search or "third party" search. This would fly in the face of the Court's implied reasoning that a third party (to a home search) is one conducted inadvertently by someone other than the owners of the home.

Secondly, Ms. Reedy cannot be said to have taken on a position as a genuine third party because her **sole purpose** was to affect the arrest of Petitioner, thereby appropriately acting as an agent of the government would act. "A search by a [third party], however, may be classified as a governmental intrusion where the [party's] employee engaged in the search for the **sole purpose** of assisting the government." *U.S. v. Walther*, 652 F2d 788, 792 (9th Cir 1981); *Corngold v. U.S.*, 367 F2d 1 (9th Cir 1996)(en banc). An adopted test which analyzes the mindset of the "third party" to determine whether such a party's search (in this case either by Ms. Reedy or Mrs. Anderson) has been used by numerous circuit courts following this logic. By such, a search could not be a legitimate private party search; determitive is "1) whether the government knew or acquiesced in the intrusive conduct, and 2) whether the party performing the search intended to assist law enforcement efforts". See *U.S. v. Miller*, 688 F2d 652, 657 (9th Cir 1982); *U.S. v. Walther*, 652 F2d 788 (9th Cir 1981); *U.S. v. Pierce*, 893 F2d 669, 673; (5th Cir 1986)(citing *U.S. v. Walther*); *U.S. v. Bazan*, 807 F2d 1200, 1203 (5th Cir 1986)(same). "[Private party] testified that the **only** reason he opened the case was his suspicion that it contained illegal drugs. Thus, legitimate business considerations such as prevention of fraudulent loss claims were not a factor ... [Thus the private party] opened the package with the **requisite mental state** of 'an instrument or agent' [of the government]." *U.S. v. Walther* at 792.

The private party search doctrine does not apply to the warrantless search of Petitioner's home by government agents. The district court improperly put the burden upon the Petitioner to rebut an inapplicable private search doctrine justification for a warrantless search by government agents, rather than it being per se unreasonable in that there were also absolutely no exigent circumstances present.

> Except for the fact that the offense under investigation was a homicide, there were no exigent circumstances in this case ... There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. And there is no suggestion that a search warrant could not easily and conveniently have been obtained. Such circumstances do not create exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search.

Mincey v. Arizona, 437 U.S. 385, 394 (1978).

The government agents in Petitioner's case had ample opportunity to obtain a search warrant. The search was conducted on Monday at 3:00 p.m. Agent Ruffen admitted that it would have been no problem to obtain one [warrant] (see S.T. A-28). It was clear to the agents that Ms. Reedy was acting on behalf of Mrs. Anderson, and that they both had the requisite mental state of aiding the government and causing the arrest of Petitioner as the sole reason for the search (see S.T. A-26). It was also clear that because Petitioner would not be home for three days, there were no exigent circumstances.

Rather than properly securing a search warrant from a detached magistrate, the government agents chose to shortcut

the Constitutional protections afforded by the Fourth Amendment (and the Fifth Amendment right to due process), and proceeded to initiate a search of Petitioner's home **on a "suspicion"** that evidence they obtained would justify their illegal actions. Agent Ruffen admits knowing, prior to the search, of Petitioner's vast experience and involvement in professional and Olympic firearms use (discussed ante) and that "there was a way to legally have the type of firearms that were there." (S.T. A-19, Agent Ruffen). Knowing all this, the government agents did not even bother to make inquiry to the National Firearms Registry (NFR) to check whether Petitioner did indeed have guns legally registered to him. Thus, without such true probable cause, and with only a suspicion fueled only by Mrs. Anderson's obvious animas comments, government agents proceeded to search Petitioner's home. Had the government first checked with the NFR, and arguably found that Petitioner did have legally registered guns, and then proceeded also as here to initiate a search as well and then discovered "unregistered guns" in addition to registered ones, such search and seizure of the illegal ones would as well be hard to justify, being first informed that there were legally registered guns to Petitioner. Hence, the mere lack of the agents first checking with the NFR first does not open the door for a search. In other words, a search is okay because we don't know for sure if there are unregistered guns present so we're going to search for anything we can find. No need to let possible results from NFR interfere with a desire to search and find a possible violation.

The Court has had a long history of keeping "in check" this type of abusive governmental conduct which shortcuts Constitutional safeguards. "Any assumption that evidence to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to

a nullity and leave peoples' homes secure only in the discretion of police officers." *Johnson v. U.S.*, 333 U.S. 10, 14 (1948).

The search of Petitioner's home was unconstitutional.

"A seizure affects the person's possessory interests."

Segaro v. U.S., 468 U.S. 796, 806 (1984)

"A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property."

U.S. v. Jacobsen, 466 U.S. 109, 113 (1984)

Without a valid warrant to seize, without exigent circumstances, and without permission of Petitioner, government agents unconstitutionally seized his personal and private property (gun collection). This act violated the Petitioner's Fifth Amendment right to due process and his Fourth Amendment right against unreasonable "seizures". "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force". *California v. Hodari D.*, 499 U.S. 621, 626 (1991). When the government agents touched, moved, and took Petitioner's property (gun collection) they, thus effected a seizure of Petitioner's property. "We therefore hold that the agent's physical manipulation of petitioner's bag violated the Fourth Amendment." *Bond v. U.S.*, 146 L Ed 2d 365 (2000).

Mrs. Anderson plainly and clearly advised the agents prior to their search that the guns were the property of the Petitioner and were not hers and she had no authority over them and that further, she had no authority over the area they

were enclosed within (the sealed and enclosed compartment) (see S.T. A-29 and A-32). The agents also knew, at the time prior to the search, of Petitioner's vast experience and involvement in the defense industry and in the professional and amateur gun sector. Further, the government agents readily admitted that it was quite possible for those exact type of guns contained within Petitioner's gun collection, to have been there legally (See S.T. A-19, A-22 and A-23). In fact, the government agents had not even checked with the NFR prior to coming out to search to determine whether there was or was not any guns registered to Petitioner in order to have some legitimate probable cause. Instead, the government agents initiated a search and effected a seizure and **"hoped"** that the allegations of a wife (Mrs. Anderson) who had just filed for a bitter divorce seeking a sizable settlement, would **"pan out"** after they had taken the property of Petitioner back to their headquarters and then later in the week checked with the NFR to see if Petitioner had any registered guns and if these guns were registered properly.

"The simple language of the [Fourth] Amendment applies **equally** to seizures of persons and to seizures of property." *Payton v. New York*, 445 U.S. 573, 585 (1980). "[T]he warrantless arrest of a person is a species of seizure required by the Amendment to be reasonable." *Payton v. New York* at 639 quoting *Beck v. Ohio*, 13 L Ed 2d 142. Certainly, based only on an allegation of a spouse who had filed a bitter divorce proceeding, and knowing the Petitioner's background, character, and professional business and professional associations in the firearms sector, a government agent would not have had "legitimate probable cause" to effect the arrest then and there of Petitioner, had he been home---no more than they would have had they walked into the home of an avid gun collector or into the business of a gun store owner had their spouses entered into a similarly

bitter divorce and espoused allegations. The government agents would have at least checked with NFR first. Consequently, neither then existed the right or probable cause to then unconstitutionally seize Petitioner's property of his gun collection.

An illegal seizure of person or property is the same in the Court's view as has been expressed in many previous opinions of the Court. The government agents had, when they illegally seized the Petitioner's private property, **"only a 'reasonable suspicion'** by which that means something less than probable cause." *Arizona v. Hicks*, 94 L Ed 2d 347, 355 (1987). "[Probable cause] mean[s] more than just bare suspicion." *Brinegar v. U.S.*, 338 U.S. 160, 175 (1949).

Thus, in this instance, and "[i]n the ordinary case, the Court has viewed the seizure of personal property as **per se unreasonable** within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause." *U.S. v. Place*, 77 L Ed 2d 110, 116 (1984). The seizure of Petitioner's gun collection was per se unreasonable. The district court erred in not treating **"the seizure"** of Petitioner's exclusive and private property of his gun collection as per se unreasonable and requiring the government to meet the burden of proving the "seizure" was not unreasonable, and thereby unconstitutional. **As the government never met this burden and did not justify the "seizure" portion of the "search and seizure", the seizure is per se unreasonable and unconstitutional and the product of the seizure should have been suppressed by the district court.**

As explained ante, the government agents also moved, removed, and then opened the closed containers and then ultimately took them as well. All this without a warrant, without Petitioner's permission, without probable cause, and

with no exigent circumstances present what-so-ever. "[W]here law enforcement authorities have probable cause to believe that a container holds contraband or evidence of .a crime, but have not secured a warrant, the Court has interpreted the [Fourth] Amendment to permit seizure of the property, **pending issuance of a warrant** to examine its contents **if the exigencies of the circumstances demand it".** *U.S. v. Place*, *supra* at 117 quoting *Arkansas v. Sanders*, 442 U.S. 753, 761 (1979).

Without addressing the issue of the constitutionality, or reasonableness, of the "search", arguendo, the "seizure" of Petitioner's sole and exclusive property of his gun collection was unreasonable and unconstitutional. "Plain-view" doctrine is often considered an exception to the general rule that warrantless searches are presumptively reasonable, **but this characterization overlooks the important difference between searches and seizures."** *Horton v. California*, 110 L Ed 2d 112, 120-121 (1990). This distinction between searches and seizures and the different satisfying elements required of a seizure is, because unlike searches, "a seizure deprives the individual of dominion over his or her person or property." *Horton v. California* at 120 quoting *U.S. v. Jacobsen*, 113 L Ed 2d 85, 466 U.S. 109, 113 (1984), thus implicating both the Fourth and Fifth Amendment protections of an individual.

Without addressing the expectation or forseeability of privacy issues in relation to the search of the Petitioner's private compartment located within his home, Petitioner's wife, Marylynne Anderson, clearly stated and made clear to the government agents prior to any search that was initiated that **Petitioner had an expectation of privacy against seizure** of his private property of his gun collection. This being evidenced not only by her statements (ante) that they were not her property and she was not even authorized or

allowed to view or possess (to which she agreed and adhered to for over 15 years), but also by the manner of "securing away" in the home of such valuable collection. This, evidencing a clear expectation of privacy against any unreasonable seizure. "The defendant must demonstrate a privacy expectation in of both the item seized and the place searched." *U.S. v. Salvucci*, 448 U.S. 83, 93, 65 L Ed 2d 619 (1980).

> Thus, we hold that in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy **in the place searched,** and that his expectation is reasonable; i.e., one that has 'a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to **understandings** that are permitted by society.

Minnesota v. Carter, 525 U.S. 83, 142 L Ed 2d 373, 379 (1998) quoting *Rakas v. Illinois*, 439 U.S. 128, 143-144 and n.12, 58 L ed 2d 387 (1978). Certainly an **understanding** and agreement within the sanctity of a marriage is permitted and honored in society as well as having a basis in property law of the State of Texas. Texas treating within its treatment of real and personal property laws allows (allocates) within a marital union separate and distinct property from the community property of the marriage. It is undisputed that Mrs. Anderson fully acknowledged and disclosed prior to the search and seizure, that she had no property interests in the gun collection, and had, admittedly, **consummated an understanding with Petitioner granting him such privacy expectation of his gun collection and the area in which it was stored.**

The Court has not addressed a situation composing the

elements as exist in Petitioner's case involving such unconstitutional seizure of Petitioner's private property without a warrant and without due process. The seizure of Petitioner's gun collection by the government agents violated the Petitioner's Fourth Amendment rights against unreasonable seizures and the district court clearly erred by not considering such seizure per se unreasonable and granting Petitioner's Motion to Suppress the evidence gleaned from such unconstitutional acts.

The government agents took short-cuts around the protections guaranteed by the Constitution's Fourth and Fifth Amendments, and "hoped" that their results would justify their means. This has not been the position of this Court's views regarding due process and Fourth Amendment protocol. This case merits the attention of the Court, as a spouse, as in the instant case, may not waive or destroy the important protections of the individual that are grounded in the Fourth and Fifth Amendments of the Constitution of the United States.

CONCLUSION:

The significant and simple language of the Fourth Amendment means that "reasonableness is still the ultimate standard under the Fourth Amendment," *Soldal v. Cook County*, 121 L Ed 2d 450, 465 (1992), which means any "reasonableness determination will reflect a careful balancing of governmental and private interests." *Id.* Here, in Petitioner's case, neither the search nor the seizure can be said to have been "reasonable".

With the sole mindset to effect her husband's arrest for possession of unregistered guns, Mrs. Anderson, and her attorney Ms. Reedy, acted as "an agent of" the government in bringing government agents into the sanctity of

Petitioner's home and his private space and property within their home and allowing them unfettered access to search their home and ultimately seize Petitioner's private and separate property, all without a warrant to either search or seize. The government agents, whom acted only on the sole statement of allegations of Mrs. Anderson rather than establish legitimate probable cause by contacting the NFR to check to see if Petitioner did or did not have registered guns first and then, based upon such information, then to have probable cause, did circumvent the constitutionally required procedures and instead gave to Mrs. Anderson immunity **in consideration for** allowing them to search without a warrant. This intrusive governmental conduct violates the sanctity of one's home and the sanctity of a marriage. Whether a marriage is salvageable or reconcilable, and the point within such at which an animas-discord becomes visible, especially by a government agent, does not, our founders would surely have thought, give the government unfettered discretion to use such then existing discord to the government's advantage by circumventing the important **personal protections** guaranteed by the Constitution. This would have been thought of as highly unreasonable by the Constitution's drafters.

The mere fact that the government agents came across items (gun collection) that they expected to find did not provide probable cause that such items were not properly registered. A simple, phone call to NFR would have properly established proper probable cause prior to the search and certainly prior to a seizure. Further, a simple telephone warrant could have been obtained at any time to search as well as to seize any property discovered as there were clearly no exigent circumstances present. Seizure of Petitioner's property was a clear operation of "collecting evidence" before probable cause of an actual crime had been obtained. "[T]he right against unreasonable seizures would

be no less transgressed if the seizure was... undertaken **to collect evidence".** *Soldal v. Cook* at 464. Because the government agents found items they expected to find in Petitioner's home, as they testified, they could have been completely legal to possess by the Petitioner. Because they had developed no legitimate probable cause by checking the registrations at NFR prior to their search, these items (gun collection) were not incriminating in and of themselves because all the guns in the gun collection would have been completely legal to possess had the Petitioner paid a tax on them and registered them at the NFR. "[S]uch seizure must satisfy the Fourth Amendment and will be deemed reasonable only if the item's incriminating character is "immediately apparent." *Id.* quoting *Horton v. California, supra* at L Ed 2d 136-137. "[E]ven where the object is contraband, this Court has repeatedly stated and enforced the basic rule that police may not enter and make a warrantless seizure. *Horton* at 123; also *Taylor v. U.S.*, 286 U.S. 1, 76 L Ed. 951 (1932); *Johnson v. U.S.*, 333. U.S. 10, 10 L Ed 436 (1948); *Jones v. U.S.*, 357 U.S. 493, 497-498, 2 L Ed 2d 1514 (1958); *Coolidge, supra* 403 U.S. at 468.

Mrs Anderson, admittedly, by understanding and agreement with her husband, Petitioner, did not have common authority over Petitioner's gun collection or the secured compartment in which it was stored. The government agents went only to that area and searched that area only in their actions. The Petitioner's Fourth Amendment protection against unreasonable searches was violated. Further, the Petitioner's Fourth Amendment right against unreasonable seizures was violated. Because these rights attach to the individual, in Petitioner's case and circumstances, neither of these rights could have been lawfully waived or circumvented and therefore, the district court clearly erred by putting the burden upon the Petitioner instead of not treating **both** the search and the seizure as **per**

se unreasonable. Thus, the district court clearly erred by not granting the Petitioner's Motion to Suppress.

The Petitioner Prays that this Honorable Court will grant Petitioner's Writ, thereby providing an opportunity for a bright-line to be drawn on Fourth Amendment rights as they are presented by the facts of this case and to which this Honorable Court has yet to speak to head-on.

Respectfully Submitted,

Terence Anderson, Pro Se (30833-177)
FCI Seagoville, POB 9000
Seagoville, TX 75159-9000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10232

[DATE STAMP
U.S. COURT OF APPEALS
FILED
FEB - 9 2005
CHARLES R. FULBRUGE III
CLERK]

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

TERENCE ANDERSON
Defendant - Appellant

Appeal from the United States District Court for the
Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Opinion 12/15/04, 5 Cir., _____, _____ F.3d _____)

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

(✔) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/_____
United States Circuit Judge

REHG-GA

[CLERK'S NOTE STAMP]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10232
Summary Calendar

[DATE STAMP
United States
Court of Appeals
Fifth Circuit
FILED
December 15, 2004
Charles R. Fulbruge III
Clerk]

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

versus

TERENCE ANDERSON,
Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:03-CR-244-ALL-H

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:*

Terence Anderson appeals his conditional guilty-plea conviction for unlawful possession of 16 firearms which were not registered to him in the national registry. Anderson argues that the district court erred in denying his motion to suppress evidence seized from a hidden compartment within his home.

Anderson first disputes the district court's findings that the private search by Anderson's wife of the hidden compartment was reasonably foreseeable. Anderson secondarily argues that his wife lacked actual or apparent authority to consent to the search of the hidden compartment.

Based on Anderson's wife's status as co-owner and co-occupant of the marital home, it was reasonably foreseeable that she might enter and search the hidden compartment, despite Anderson's orders to the contrary and regardless of the circumstances surrounding Anderson's extra-marital activities. *See United States v. Shelton*, 337 F.3d 529, 536-38 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 1507 (2004). Similarly, given Anderson's wife's equal rights to the use and occupation of the marital home, she was authorized to give valid consent to the search of the premises. *See id.* Accordingly, the district court did not err in denying Anderson's motion to suppress. *See United States v. Alvarez*, 6 F.3d 287, 289 (5th Cir. 1993).

AFFIRMED.

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*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[DATE STAMP
U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
OCT - 6 2003
CLERK, U.S. DISTRICT COURT
By_____
Deputy]

UNITED STATES OF AMERICA,

v. Case No. 3:03-CR-244-H

TERENCE ANDERSON,
Defendant.

ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court are Defendant's Motion to Suppress, filed August 25, 2003; Government's Response to Defendant's Motion to Suppress, filed September 8, 2003; and Defendant's Reply to Government's Response to Defendant's Motion to Suppress, filed September 12, 2003. Also before the Court are Defendant's Supplemental Brief Regarding Community Property, filed October 2, 2003, and Government's Brief Regarding Application of Community Property Rule to Consent by Spouse, filed October 2, 2003. The Court held an evidentiary hearing on these matters on

October 3, 2003. For the following reasons, Defendant's motion to suppress is DENIED.

Defendant Terence Anderson moves to suppress evidence, *i.e.*, guns and related items, seized from his residence on February 18, 2003, pursuant to a warrantless search by special agents of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). Defendant contends that his wife, Marilyn Anderson, lacked actual and apparent authority to consent to the search of a hidden compartment within their residence. The Government, on the other hand, asserts that Mrs. Anderson possessed both actual and apparent authority to consent to the search, that the "private search" doctrine justified the search, and that public policy justified the search. Defendant says that the "private search" doctrine does not justify the warrantless search in this case because Mrs. Anderson's private search was not reasonably foreseeable.[1] Because the Court concludes that the "private search" doctrine is dispositive, the Court will not address the other contentions of the parties.

Findings of Fact

1. In or about February 1982, Defendant and Mrs. Anderson moved into their marital residence at 4534 Walnut Hill Lane, Dallas, Texas. They had been married since March 19, 1976. They have two children, a son and a daughter.

2. In 1982 or 1983, Defendant constructed a hidden compartment in the residence. The hidden compartment was located behind a built-in bookcase

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[1]At the hearing, Defendant withdrew his other challenges to the applicability of the "privare search" doctrine.

in an office area used by both Defendant and Mrs. Anderson.

3. Approximately ten or fifteen years ago, Defendant instructed Mrs. Anderson never to access the hidden compartment. At that time, Defendant used caulk to seal the hidden compartment. Mrs. Anderson did not access the compartment until February 2003.

4. Before Defendant departed for an overseas business trip on December 26, 2002, Mrs. Anderson discovered ten Viagra pills in Defendant's vehicle. Upon Defendant's return on January 20, 2003, Mrs. Anderson found only three and a half Viagra pills among Defendant's toiletries. Mrs. Anderson confronted Defendant about the Viagra pills.

5. On or about January 25, 2003, Mrs. Anderson discovered a piece of paper containing information about two women. Mrs. Anderson confronted Defendant about the women described on the piece of paper.

6. On or about February 2, 2003, Mrs. Anderson observed Defendant act in a suspicious manner when he received a telephone call at home. Mrs. Anderson followed Defendant outside where she observed Defendant speaking on the telephone with someone Mrs. Anderson suspected was female. Mrs. Anderson confronted Defendant about the telephone call.

7. Mrs. Anderson discovered or observed other suspicious activity with respect to Defendant. For example, Mrs. Anderson discovered that Defendant holds as many as three passports, including one in another name; that Defendant has used multiple

aliases; and that Defendant has obtained identification and credit cards in other names. Mrs. Anderson discovered that Defendant had told their daughter that he possessed illegal weapons. Mrs. Anderson observed changes in Defendant's behavior, appearance, and travel habits.

8. During the first week of February 2003, but no later than February 10, 2003, Mrs. Anderson began investigating Defendant's behavior, including her suspicions about his infidelity. At that time, Mrs. Anderson remembered the hidden cornpartment and noticed that tbe caulk seal had been broken. Mrs. Anderson removed two nails that held the built-in bookcase in place and exposed the compartment. Mrs. Anderson discovered a number of firearms in the compartment. Mrs. Anderson photographed the firearms without removing them from the compartment. Mrs. Anderson then replaced the built-in bookcase and the two nails.

9. On February 13, 2003, Mrs. Anderson met with divorce attorney Julie Reedy. During their meeting, Mrs. Anderson showed Ms. Reedy her photographs of the firearms. On February 14, 2003, Ms. Reedy filed for divorce on behalf of Mrs. Anderson.

10. On February 16, 2003, Mrs. Anderson, Ms. Reedy, and another private citizen again searched the hidden compartment. The private citizen was an acquaintance of Ms. Reedy who had knowledge of firearms. During this search, the private citizen removed the firearms from the hidden compartment, examined them, and photographed them. Following the search, they replaced the firearms, the built-in bookcase, and the two nails.

11. On February 17, 2003, Ms. Reedy contacted ATF about the firearms. On February 18, 2003, ATF Special Agents Jim Ruffin, Josh Yoder, and Brent Gresham arrived at the Anderson residence. After waiting for Ms. Reedy to arrive at the residence, Mrs. Anderson signed a consent to search form. Before the ATF agents began their search, Mrs. Anderson informed them that Defendant had expressly prohibited her from accessing the hidden compartment. The agents did not attempt to obtain a warrant.

12. Upon removing the built-in bookcase, the ATF agents immediately recognized the firearms as being of the type that must be registered in the National Firearms Registration and Transfer Record ("NFRTR"). The agents removed the firearms from the hidden compartment and examined them. The agents photographed the firearms both before and after removing the firearms from the hidden compartment. Based on the type, number, and clandestine location of the firearms, as well as on statements made by Mrs. Anderson, the special agents believed that they had probable cause to seize the firearms and parts that appeared to be contraband. The agents immediately identified at least one silencer as being illegal for not having a serial number.

13. In addition to the firearms and parts that were in plain view, the special agents opened three containers, the contents of which were also seized. With respect to the first container, which was a metal briefcase, the special agents recognized the briefcase as a kind commonly used to store guns. The metal case contained an Israel Military Industries, Model A UZI

semi-automatic, 9 mm caliber machine gun, serial number SA 34386. The metal case also contained two silencers. With respect to the second container, which was a clear plastic case, the special agents could see inside the case without opening it. The case contained a drop-in auto sear and other gun parts. Finally, with respect to the third container, which was similar to a case for sunglasses, the special agents believed that the case would contain contraband similar to that which they had already found. The case contained a .22 caliber "pen gun."

14. In sum, the special agents seized ten machine guns, including one drop-in auto sear; five silencers; and one "pen gun" from the hidden compartment. According to Special Agent Ruffin, it was one of the largest collections of such firearms he had encountered in his career.

15. On February 19, 2003, the ATF confirmed that the seized firearms had not been registered in the NFRTR.

Conclusions of Law

16. The Fourth Amendment protects against unreasonable searches and seizures. As a general rule, a search must be conducted pursuant to a warrant based on probable cause. *See Katz v. United States,* 389 U.S. 347, 356-57 (1967). A warrantless search of a home is presumptively unreasonable. *See Payton v. New York,* 445 U.S. 573, 586 (1980). The Government must prove the constitutionality of a warrantless search by a preponderance of the evidence. *See United States v. Matlock*, 415 U.S. 164, 177 (1974).

17. However, "[i]t is well-settled that the protection prescribed by the Fourth Amendment proscribes only government action, and that private party searches of property, even if wrongfully conducted, do not raise Fourth Amendment implications." *United States v. Paige*, 136 F.3d 1012, 1017 (5th Cir. 1998). Accordingly, "a police view subsequent to a search conducted by private citizens does not constitute a 'search' within the meaning of the Fourth Amendment so long as the view is confined to the scope and product of the initial search." *United States v. Runyan*, 275 F.3d 449, 458 (5th Cir. 2001) (quoting *United States v. Bomengo*, 580 F.2d 173, 175 (5th Cir. 1978)) (internal quotations omitted). In order for the "private search" doctrine to apply, the private citizen must not have been acting as "an instrument or agent of the government," and the private search must have been "reasonably foreseeable" to the occupant of the searched space. *See Paige*, 136 F.3d at 1018, 1020.

18. In the instant case, Defendant contends that Mrs. Anderson's search of the hidden compartment was not reasonably foreseeable to Defendant and that therefore the "private search" doctrine does not apply.[2] The Court disagrees. Defendant and Mrs. Anderson have been married since 1976. Defendant knew that Mrs. Anderson had knowledge of the hidden compartment in their residence. In the month before her search of the hidden compartment, Mrs. Anderson confronted Defendant on three separate

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[2]As noted above, Defendant's only argument against the applicability of the "private search" doctrine is that Mrs. Anderson's search of the hidden compartment was not reasonably foreseeable to Defendant. Accordingly, the Court does not address the other elements of the "private search" doctrine.

occasions about things she had found or observed that indicated infidelity on the part of Defendant. In addition, Mrs. Anderson had observed changes in Defendant's behavior, appearance, and travel habits. Mrs. Anderson had also discovered Defendant's use of aliases, as well as a passport, identification, and credit cards in other names. Finally, Mrs. Anderson had learned of Defendant's statement to their daughter that he possessed illegal guns.

19. Based on the foregoing, the Court concludes that it was reasonably foreseeable to Defendant that his wife might enter and search the hidden compartment. Foreseeability to Defendant that the compartment might be entered and searched is also established by the fact that Defendant had previously caulked the entry to the compartment to discourage entry. Mrs. Anderson's search was encouraged when she noticed that the compartment was no longer sealed with caulk.

20. Accordingly, the Court concludes that the "private search" doctrine applies in the instant case. Defendant's motion to suppress is therefore DENIED.

SO ORDERED.

DATED: October 6, 2003.

/s/ BAREFOOT SANDERS
BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,

NUMBER 3:03-CR-244-H

VERSUS

October 3, 2003

MR. TERENCE ANDERSON

HEARING ON MOTION TO SUPPRESS
BEFORE THE HONORABLE BAREFOOT SANDERS

APPEARANCES:

For the Government:

MR. MICHAEL GILL
Assistant United States Attorney
UNITED STATES DEPARTMENT
OF JUSTICE
NORTHERN DISTRICT OF TEXAS
U.S. Courthouse
1100 Commerce Street
Dallas, Texas 75242
214/659-8600

For the Defendant:

MR. BARRY SORRELS
MS. MARLO CADEDDU
SORRELS & UDASHEN
2301 Cedar Springs Road
Dallas, Texas 75201
214/468-8100

Court Reporter:

Cassidi L. Casey, CSR No. 1703

1100 Commerce Street, Rm 15D6L
Dallas, Texas 75242
214/651-9252

PROCEEDINGS:

THE COURT: The Court is in session this morning to hear a motion to suppress filed by the defendant in a case styled United States against Terence Anderson, which is 03-244.

What says the government?

MR. GILL: The government is ready.

THE COURT: What says the defendant?

MR. SORRELS: Your Honor, we're ready. I was just informed a moment ago that a witness I issued a subpoena duces tecum, a hostile witness is out in the hallway. I haven't had a chance to talk with her, but subject to maybe taking a moment to talk with her, we're ready.

THE COURT: Well, you are ready for the government to proceed?

MR. SORRELS: Yes, your Honor.

THE COURT: And I'll give you time to talk to the witness before you get to your side of the case.

MR. SORRELS: Thank you.

THE COURT: I understand there are exhibits. You want to list those exhibits by number?

MR. GILL: I understand the defense has no objections to the Government's 1 through 36.

THE COURT: And those are admitted without objection, right, Mr. Sorrels?

MR. SORRELS: Yes, your Honor.

THE COURT: And then you have certain exhibits or do you?

MR. SORRELS: Yes, your Honor, those are already attached to the briefs that have been filed, and we'll provide copies of those.

THE COURT: The government has no objection, as I understand it. Is that right?

MR. GILL: That's correct, your Honor.

THE COURT: Are they numbered at all or just attached to the motion?

MR. SORRELS: They are numbered, your Honor.

THE COURT: All right. I will take them in that manner. They are admitted also without objection. We'll proceed first with the government's presentation. Are you ready to go, Mr. Gill.

MR. GILL: Yes, your Honor, at this time the government invokes the Rule.

THE COURT: All right. The Rule is invoked. And we will have, of course, Mr. Anderson, the defendant, and who will be the government's representative.

MR. GILL: Special Agent Grissom from the ATF.

THE COURT: And who else will you be calling?

MR. GILL: Marylynn Anderson and Jim Rolf.

THE COURT: And they are in the courtroom?

MR. GILL: Outside.

THE COURT: And you will instruct them about the Rule?

MR. GILL: Yes, your Honor.

THE COURT: Anything further to take up before we go? Mr. Gill, do you have anything else?

MR. GILL: No, your Honor.

THE COURT: You.

MR. SORRELS: No, your Honor.

MR. GILL: At this time the government calls Special Agent Jim Ruffen.

(Sworn)

(Witness sworn)

MR. JIM RUFFEN
DIRECT EXAMINATION

BY MR. GILL:

Q Would you please state your name for the record?

A James Ruffen.

Q What do you do for a living?

A I'm a Special Agent with the Bureau of Alcohol Tobacco and Firearms.

Q And how long have you been with them?

A Thirteen years.

Q And tell us your responsibilities with the Agency?

A I'm the supervisor for Group 3, which is the Dallas...

[BREAK]

BY MR. GILL:

Q On the 18th of February sometime around the lunch hour, I received a call from a civil attorney, Julie Reedy, who wanted to ask me some questions and possibly report some firearms violations that add been uncovered. I had about a thirty-minute conversation with the attorney about what they had found. Apparently they had found –

MR. SORRELS: I object to hearsay, your Honor.

THE COURT: Well, it's just laying a predicate here I think. The actual conversation is going to be hearsay.

MR. GILL: And your Honor, the government would submit since this is a suppression hearing hearsay is admissible.

THE COURT: I don't know about that. I'll exercise a little control over it, but I'll overrule the objection here.

BY MR. GILL:

Q Special Agent Ruffen, please tell Judge Sanders about the information you gathered from Julie Reedy that had effects on what you perceived to be the situation with these illegal weapons.

A In my discussions with Julie Reedy, the facts that I gathered over the telephone were =

MR. SORRELS: I object to hearsay, your Honor.

THE COURT: I am going to overrule it. I don't...

[BREAK]

anything from the statements of Ms. Reedy that these may be illegal weapons?

A Yes.

Q Tell us about that.

A The conversation with Ms. Reedy, as I was stating earlier =

MR. SORRELS: I object again to hearsay, your Honor.

THE COURT: Yes, sir. You have a running objection.

MR. SORRELS: Thank you, Judge.

A As I was stating earlier, there were other things that brought me to be suspicious of what was going on with those firearms. At that time on the phone conversation, there was a way to legally have the types of firearms that were there. There was also ways that they could be illegal, too. So the information that she said was that Mr. Anderson had made a statement to the daughter that –

THE COURT: Excuse me. Who said? Ms. Reedy said this?

THE WITNESS: Ms. Reedy was telling me over the telephone.

THE COURT: All right.

A She said that Mr. Anderson had made a statement to the daughter that the daughter was going to be getting some jewelry and other things that were tangible, and she was lucky because Edward the son was going to be getting the firearms which were illegal and could not be sold.

So based upon the conversation I had with Ms. Reedy, I had that statement; I had the knowledge of the firearms that she read off to me, knowing that they were possibly and probably illegal; the statements about having the multiple passports, using multiple identities; the clandestine nature of the hidden compartment behind the bookshelf. We used all of that information to decide to go out there and look at these firearms.

Q Please tell us who went out to look at the firearms from ATF.

A Myself and Special Agent Grissom and Special Agent Josh Yoder.

Q Do you recall the address the home is located at?

A 3544 Walnut Hill here in Dallas.

Q And who did you find at the residence when you arrived?

A We found Ms. Anderson at the residence alone. She was inside the residence. I knocked on the door, showed her my credentials and identified ourselves, and she told us who she was, and we walked just inside into the foyer. She said she would rather wait to look at the firearms until her attorney, Julie Reedy arrived. We sat in the foyer, just stood there five minutes before the attorney arrived.

Q Please tell us what happened after Ms. Reedy derived.

A After Ms. Reedy arrived, we walked through the dining room area into the hallway and made a right hand turn into an office area following Ms. Anderson, and she pointed out the bookcase that the firearms were hidden behind.

Q Would you please generally describe the area of the house where this bookcase is located?

A Sure, it's going to be on the right-hand side of the residence as you are facing the residence. Almost to the garage area. It's off the kitchen hallway. It's a common area

that has a doorway going into it, and there is two offices off to the left once you enter that room.

MR. GILL: Your Honor, may I approach the witness?

THE COURT: Yes, sir.

MR. GILL: Your Honor, in order to assist the Court, is it okay if the witness steps down to draw a sketch?

THE COURT: That's all right. Mr. Sorrels, you may come up and see it if you want to.

THE COURT: As far as your running objection, it's pretty clear that what he's testifying to now is the basis for what he did. So I'll overrule on that basis. That's your hearsay objection.

BY MR. GILL:

Q Mr. Ruffen, step down and could you generally draw the area where you found the bookcase and give Judge Sanders...

[BREAK]

discussed with Ms. Anderson and with attorney Julie Reedy on the day that we were at the residence, February 18.

Q I notice that a portion of the concept to search form, particularly Paragraph 2, has been marked out. Please explain that.

A This is an agreement about self-incrimination that we wanted to clear up with the form. Myself, Ms. Anderson,

Attorney Julie Reedy discussed this form, discussed the possible implications of it. We called the Chief of the Criminal Division, Mark McBride, discussed the form, discussed what we were doing with him. And he advised that it was all right to remove that statement on the consent to search form.

Q At the point that Ms. Anderson completed this form, did you see anything in your investigation that indicated to you that she had known about these weapons prior to opening that compartment?

A I did not. Everything I had been told by Ms. Reedy was, in fact, the way that it actually was. Some of the things I looked for when I went to the residence, there was no for sale signs in the yard. I was really trying to be careful about not getting involved in the civil issue here. To me, at that time, not only was it – It was protection of the community for sure because of the nature of these firearms because she had read the names of the firearms to me...

[BREAK]

the firearms were illegal.

Q I don't want to belabor this, but I'll ask you to take a look at Exhibit 6 and tell us about looking at that. Generally just tell Judge Sanders about when you look at that what tells you as an ATF agent those appear to be illegal weapons.

A Well, again, those are an UZI machine gun, a Thompson, a couple of Sten guns. I can't tell what the other ones are just through the picture. But there is only two ways to have these types of weapons: one is to register them and one not to have them registered. And based on what I had

seen in the closet, how he had hidden them and the fact that – This is pretty much the most extensive set of machine guns that I have seen in my career as far as the number of them and the types. And these are a lot of valuable guns.

Q Would you also please turn to Government's Exhibit Number 16?

A Which number?

Q 16, sir. Please tell us observing that gun as you saw it inside the compartment what you believed to be illegal about that weapon.

A This is a semi-automatic pistol which has a silencer on the end of it.

Q And finally, if you take a look at Government's Exhibit 19. Tell Judge Sanders what it is about those items...

[BREAK]

thing that are kind of like drop-in sears. They are small, easily concealable. We had opened up several boxes, found various parts, saw this box and definitely believed because it was in the cabinet with this other firearm stuff that it would contain firearm stuff, and it did. It was a little sunglass case, not locked. We opened it up, and there was a little Sten gun in there, and for the Court's purposes, it was no bigger than the pen you have in your pocket.

Q And what did you do with those weapons?

A We took those weapons back to the ATF office here in Dallas. We logged them into the evidence vault, and then we prepared them – Well, after that, once we logged

them in and got all the serial numbers we did an NF to make sure these were not registered, and they were not. We ran them by their serial number and by his name, and none of them came back as legally registered.

Q When you say his name?

A Mr. Anderson.

Q Did you run different variations of his name?

A Yes, we did. Based upon the various names that he used, we did use different spellings that came up on some of his reports. After that, the weapons were boxed up and shipped to Washington D.C. where they were tested by our testing branch that issued a report back several months later that...

[BREAK]

BY MR. SORRELS:

Q Agent Ruffen, you also I believe learned when you were first contacted – Were you contacted by a Lawyer Reedy on the 17th of February? Is that what you said?

A February the 18th, about lunch.

Q So the day you went out to this home was the first time that you had contact with Lawyer Reedy or Marylynn Anderson about the matter you have told Judge Sanders about; is that correct?

A That's correct.

Q Now, in that conversation that you had on February 18th, Ms. Anderson told you that her husband was currently a Lieutenant Colonel in the Army Reserves. Is that correct?

A That's correct.

Q And he served as a Pentagon liaison officer with Congress. Did she tell you that?

A Yes.

Q Did she tell you that he had been in the army reserve for almost twenty years?

A I don't know if she named the number of years, but she did say an extensive period of time, yes.

Q And did you know that he was a businessman here in Dallas and had businesses elsewhere as well?

A I did not know that other than coming from her. I had no knowledge of him beforehand.

Q Did you learn that he was a United States Olympic team member in the shooting arts?

A I did.

Q And that he was seventeen times National Champion Pistol Shooter?

A I don't know if I knew that.

Q But you mentioned a civil matter, that you thought that there was a pending civil matter.

A Yes.

Q And I noticed in your report that Ms. Anderson told you that she was filing for a divorce from her husband. Is that correct?

A That's correct. Ms. Reedy advised me of that.

Q And you knew that Ms. Reedy was a domestic relations divorce lawyer; is that correct?

A Yes, I did.

Q And so you were well aware that Ms. Anderson had already contemplated, if she had not already done it, taking legal action to divorce her husband?

A Yes, based on the retention of the lawyer, I would assume that, yes.

Q And in fact, she had called federal law enforcement officers to come out to her home, is that right, in relation to the testimony that you have given?

A Yes. Can you put the first part of that sentence with it so I'll understand it?

Q Well, I mean you knew that Ms. Reedy's lawyer and Ms. Anderson, the wife that would be filing for divorce, had asked you figuratively speaking – you being the ATF, federal law enforcement officers – to come to the home to look inside a secret compartment. Is that correct?

A Yes.

Q And it was pretty clear to you, I assume, that that was antagonistic to the interest possibly of Terry Anderson. Is that correct?

A Yes.

Q That a wife would notify federal law enforcement of her – according to their allegations and interpretation of events – being involved in the possession of illegal weapons?

A Among other things, that's correct.

Q Among other things?

A Yes.

THE COURT: Is that February 18th?

THE WITNESS: Yes, sir.

THE COURT: Excuse me.

MR. SORRELS: Thank you, Judge.

BY MR. SORRELS:

Q I mean people go to the penitentiary for these types of offenses, correct?...

[BREAK]

Q And if you don't know it's there, the chances are you may never know it's there?

A That's correct. A private citizen walking through the house at a dinner party would never know it's there. That's correct.

Q Now, when you were called by the divorce attorney and Ms. Anderson and invited to come to the address that you have described, what day of the week was this?

A I couldn't tell you, sir.

Q Would you agree that as far as the day of the week, twenty-four-seven, it doesn't matter. You being the experienced law enforcement officer that you are know that if you want to type up an affidavit in an application for a search warrant that you certainly can find a judge to review the affidavit and the application and make an independent determination as to whether or not there is probable cause to issue the warrant. Is that correct?

A That's correct.

Q And so there was nothing about this situation that you can say you didn't secure a warrant because it was impossible to secure one because of the unavailability of a fair and impartial and detached judicial officer or judge. Is that correct?

A That's correct.

Q Now, so this bookcase, you were at the home, and so...

[BREAK]

You took it out with your fingers. You didn't have to have a hammer.

Q But I don't want the Court to be misled that you are talking about pegs, not nails?

A Yes, right. They were nails.

THE COURT: So we're calling a peg a nail?

THE WITNESS: Yes, sir.

BY MR. SORRELS:

Q Now, you have been talking with the prosecution about this case, is that correct, prior to the hearing today? Is that right?

A Yes, sir. I confer regularly with the U.S. Attorney's Office on all of our cases.

Q And have you reviewed the pleadings and motions and briefs that the prosecution has filed in this case?

A I have not.

Q Let me ask you, Agent, on this February 18, 2003 when you went to this location, were you told by Ms. Anderson that her husband had instructed her not to enter that private compartment?

A Yes.

Q And I notice that left that out of your direct examination. Would you tell Judge Sanders at what point Marylynn Anderson told you that her husband Terry

Anderson had instructed her not to remove the bookcase and go into the...

[BREAK]

Q Now, also Ms. Anderson told you that she had never prior to her going in there recently, within a few days before calling ATF, she had never been in there before. Is that correct? She had honored her husband's request?

A That's half correct, yes.

Q Well, I mean, do you have knowledge as to whether or not prior to her recent discovery of these weapons that she had ever been behind the bookcase or had she honored her husband's request?

A I have no knowledge that she has ever been in the bookcase before. I had no contact with her before. And if the Court will allow, the reason for her contact with the bookcase at this time was because of her suspicions of multiple identities, multiple passports, all of these other things that were going on. She knew – And I keep referring back to the exhibit of the photo that shows the broken caulk seal – that when she walked into that room and the bookcase was disturbed and the caulk seal broken, that alerted her suspicions.

Q Well, my point is she had honored her husband's requests prior to the first occasion she went in there and told you about it. That was your understanding, correct?

A That was my understanding because that was the first time I had met her.

Q And her husband is out of the country, is that correct, at the time you were at the house?

A I knew that from what she said.

Q And you knew that he was going to be back on the 20th. Is that correct?

A I believe the following Friday. I'm not sure of the date.

Q A few days away?

A Yes, sir.

Q Now, after you learned that she had been instructed by her husband to never go into the hidden compartment, at that point did you consider typing up an application and an affidavit and trying to secure a warrant to search the hidden compartment?

A I did not.

MR. SORRELS: May I approach, your Honor?

THE COURT: Yes, sir.

BY MR. SORRELS:

Q Now, you were – Were you present when Ms. Anderson was interviewed on May lst, 2003?

A I was not.

Q Have you read that report in preparation for your testimony?

A I have not.

Q Ms. Anderson, bottom line, sir, told you that she did not have authority to go into the hidden compartment before...

[BREAK]

BY MR. GILL:

Q A couple of quick things. Would you take a look at Government's Exhibit 1. I notice that the top portion, the second paragraph of that form is lined out.

A Yes.

Q The portion that says "and used against me in any court of law."

A Yes.

Q And please explain why that was lined out?

A After I read it and my attorney read the consent to search, we – before we would allow them to search or sign this document, we made it very clear that what they were about to see was not anything I had any prior knowledge of or wasn't my property, and so Jim Ruffen, I think, called someone back in his office to get permission to have this lined out. It was granted, and I initialed it. My attorney initialed it, and then Jim Ruffen initialed it.

Q As of February 18, were you concerned about what would happen if those weapons continued to stay in your home?

A Oh, very definitely.

Q Please explain why.

A Well, there were several reasons, but there had been a notation in my husband's database that he was going to store some guns, and I didn't know what that meant until I made this discovery, possibly. But my first thought was – I...